Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–704 OF 2002
GOPAL SRI RAM, HELILIAH AND AHMAD MAAROP JJCA
30 APRIL 2008

Contract — Frustration — Whether doctrine of frustration successfully raised — Test to be applied — Whether frustration excluded in respect of contracts regulated by the Housing Development (Control and Licensing) Act 1966

Contract — Sale and purchase of property — Delay in completion — Action by respondents/purchasers to recover damages for delay in delivery of vacant possession — Whether time of essence — Whether statutory contract excludes operation of s 56(3) of the Contracts Act 1950 — Whether doctrine of frustration applicable — Whether respondents' duty to prove damages — Housing Development (Control and Licensing) Act 1966 — Contracts Act 1950

Land Law — Housing developers — Delay in completion — Whether respondents/purchasers can recover damages for delay — Whether time of essence — Whether statutory contract excludes operation of s 56(3) of the Contracts Act 1950 — Whether doctrine of frustration applicable — Whether respondents' duty to prove damages — Housing Development (Control and Licensing) Act 1966

The appellant, a housing developer, whose activities were controlled by the Housing Development (Control and Licensing) Act 1966 ('the Act') and the regulations thereunder entered into agreements with members of public to sell to them apartments in a condominium which the appellant had agreed to construct. However, the appellant was unable to make delivery of the apartments and therefore the respondents brought actions against the appellant to recover damages for the delay of delivery of vacant possession of each of their apartments. The High Court found in favour of the respondents on the issue of liability. Hence the appellant's appeal which was based on the grounds, inter alia, whether s 56(3) of the Contracts Act 1950 ('the CA') applies to the contracts; whether the doctrine of frustration applies; whether the respondents were under a duty to prove the damages suffered; and whether s 47 of the CA applies. Further, there were four cross appeals by the respondents against the High Court's refusal to award compensation up to the date when each of them had taken actual physical possession of their

A respective apartments. The respondents contended that when the appellant gave each respondent concerned notice that vacant possession was available, each notice was accompanied by a statement of the balance sum due from each respondent to the appellant. However, there was at the material time liquidated damages owing from the appellant to the relevant respondents and
B the damages exceeded the sum owing from the respondents to the appellant, which entitled the respondents to a set-off. It is therefore the contention of the four respondents that they should be equally entitled to claim liquidated damages until they took possession of the keys to their respective apartments.

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Held, dismissing the appellant's appeals and allowing the four respondents' cross-appeals with costs:

(1) There was no merit in the appellant's argument in respect of s 56(3) of
D the CA. The section deals with contracts generally but, the contract which has fallen for construction in the instant case was a special contract that was prescribed and regulated by statute. While parties in normal cases of contract have the freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence,
E the parties to a contract in Form H could not contract out of the scheduled form and terms more onerous to a purchaser may not be imposed. Thus, the requirement of notice under s 56(3) which is an additional obligation to the detriment of the purchaser could not be imposed on the respondents, in this case in the light of the statutory
F scheme under the Act. Moreover, cl 22(2) of the agreements makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. This in effect means that cl 22(2) expressly excludes the operation of s 56(3) of the CA to cases falling under the Act (see para 8).

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(2) The test for frustration is that, a contract is frustrated when an event occurs which renders performance of the contract 'a thing radically different from that which was undertaken by the contract'. Therefore, although the 1997 financial crisis may have made it more onerous or
H expensive for the appellant to perform its obligations, it did not render the contract radically different. In any case, under reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989, it was open for the appellant to make representations to the Controller of Housing to show 'special circumstances or hardship' that made
I compliance with any of the terms of the agreements impracticable. Thus, reg 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the Act (see paras 12–13).

(3) The respondents were not under a duty to prove the damages that they have suffered because cl 22(2) of the statutory contract provides that the damages are liquidated and calculated in accordance with the formula prescribed by the clause and that no further onus lay upon the respondents (see para 14).

(4) Once the date for delivery of vacant possession had passed, the appellant's liability to pay liquidated damages calculated in accordance with the formula provided in cl 22(2) of the statutory contract became immediate. As such, there is no issue of time being at large arising and therefore s 47 of the CA has no application to the present case (see para 16).

(5) In respect of the four cross-appeals, the notices to give vacant possession relied upon by the appellant were clearly invalid because the delivery of vacant possession in each case was predicated upon the payment of a sum not due. The relevant respondents were therefore entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments. There was therefore merit in the cross-appeals (see para 17).

[Bahasa Malaysia summary

Perayu, pemaju perumahan, yang aktivitinya dikawal oleh Akta Pemaju Perumahan (Kawalan dan Perlesenan) 1966 ('Akta') dan peraturan-peraturan di bawahnya memasuki perjanjian-perjanjian dengan orang awam untuk menjual kepada mereka pangsapuri yang mana perayu telah bersetuju untuk membinanya. Walau bagaimanapun, perayu tidak dapat memberikan milikan pangsapuri-pangsapuri tersebut dan oleh itu responden-responden memulakan tindakan terhadap perayu untuk mendapatkan semula ganti rugi bagi kelewatan penyerahan milikan kosong bagi pangsapuri masing-masing. Mahkamah Tinggi membuat penemuan memihak kepada responden-responden di atas isu liabiliti. Maka rayuan perayu yang berasaskan alasan-alasan, antara lain, sama ada s 56(3) Akta Kontrak 1950 ('AK') terpakai kepada kontrak-kontrak tersebut; sama ada doktrin kekecewaan terpakai; sama ada responden-responden di bawah tanggungjawab untuk membuktikan kerugian yang dialami; dan sama ada s 47 AK terpakai. Selanjutnya, terdapat empat rayuan balas oleh responden-responden terhadap keengganan Mahkamah Tinggi mengawardkan responden-responden pampasan sehingga tarikh apabila setiap seorang daripada mereka telah mengambil milikan fizikal sebenar pangsapuri masing-masing. Responden-responden menghujah bahawa apabila perayu memberikan setiap responden notis bahawa milikan kosong telah sedia, setiap notis disertakan dengan pernyataan baki tertunggak daripada setiap responden kepada perayu. Walau bagaimanapun, pada masa

material, ganti rugi jumlah tertentu yang terhutang oleh perayu kepada responden-responden dan ganti rugi melebihi jumlah yang terhutang oleh responden-responden kepada perayu, yang memberikan hak kepada responden-responden untuk penolakan. Oleh itu, keempat-empat responden menghujah bahawa mereka seharusnya sama-sama berhak untuk menuntut ganti rugi jumlah tertentu tersebut sehingga mereka mengambil milikan kunci kepada pangsapuri masing-masing.

Diputuskan, menolak rayuan-rayuan perayu dan membenarkan empat rayuan balas responden-responden dengan kos:

(1) Tidak ada merit dalam hujahan perayu-perayu berkenaan dengan s 56(3) AK. Seksyen ini membincangkan tentang kontrak secara am, tetapi, kontrak sepatutnya ditafsirkan dalam kes ini adalah satu kontrak istimewa yang ditentukan dan dikawal oleh statut. Sementara, pihak-pihak di dalam kes-kes kontrak yang biasa mempunyai kebebasan untuk membuat peruntukan di antara mereka, pemaju perumahan tidak menikmati kebebasan yang serupa. Oleh itu, pihak-pihak terhadap kontrak di dalam Borang H, tidak boleh keluar dari borang-borang di dalam jadual dan terma-terma yang membebankan pembeli tidak boleh dikenakan. Oleh itu, kehendak notis di bawah s 56(3) yang merupakan kewajipan tambahan yang menjejaskan kepada pembeli tidak boleh dikenakan terhadap responden, dalam kes ini, berdasarkan kepada skim statutori di bawah Akta. Tambahan pula, klausa 22(2) perjanjian tersebut menjadikan pemaju perumahan secara langsung bertanggungjawab kepada pembeli untuk ganti rugi jumlah tertentu sebaik sahaja tarikh penyiapan telah berlalu. Ini membawa maksud bahawa klausa 22(2) secara jelas mengecualikan pelaksanaan s 56(3) AK kepada kes-kes yang tergolong di bawah Akta tersebut (lihat perenggan 8).

(2) Ujian untuk kekecewaan adalah bahawa, sesuatu kontrak terkecewa apabila berlaku keadaan yang menjadikan perlaksanaan kontrak 'sesuatu yang berbeza secara radikal daripada apa yang dipersetujui oleh kontrak'. Oleh itu, walaupun krisis kewangan 1997 mungkin menjadikannya lebih membebankan atau mahal untuk perayu melaksanakan tanggungjawabnya, ia tidak menyebabkan kontrak tersebut berubah secara radikal. Walau bagaimanapun, di bawah peraturan 11(3) Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1989, adalah terbuka bagi perayu untuk membuat representasi kepada Pengawal Perumahan untuk menunjukkan 'keadaan khas atau kesukaran' yang membuatkan kepatuhan kepada apa-apa terma perjanjian tidak praktikal. Oleh itu, jelas bahawa

peraturan 11(3) menghalang penggunaan doktrin kekecewaan terhadap kontrak yang dikawal oleh Akta (lihat perenggan 12–13).

(3) Responden-responden mempunyai tanggungjawab untuk membuktikan kerugian yang dialami kerana klausa 22(2) kontrak statutori menyatakan bahawa kerugian adalah ditetapkan dan dikira menurut formula yang ditetapkan oleh klausa dan tiada tanggungjawab tambahan terhadap responden-responden (lihat perenggan 14).

(4) Sebaik sahaja tarikh penyerahan milikan kosong telah berlalu, liabiliti perayu, untuk membayar ganti rugi jumlah tertentu yang dikira mengikut formula yang disediakan di dalam klausa 22(2) kontrak statutori, menjadi serta-merta. Oleh itu, tidak timbul isu bahawa masa adalah terbuka dan oleh itu s 47 AK tidak terpakai dalam kes ini (lihat perenggan 16).

(5) Berkenaan dengan empat rayuan balas, kebergantungan perayu terhadap notis-notis pemberian milikan kosong adalah jelas tidak sah kerana penyerahan milikan kosong dalam setiap kes adalah berdasarkan kepada jumlah yang tidak dihutang. Oleh itu, responden-responden yang berkaitan berhak untuk meneruskan untuk menuntut ganti rugi jumlah tertentu sehingga mereka mengambil milikan kunci kepada pangsapuri masing-masing. Oleh yang demikian terdapat merit dalam rayuan balas (lihat perenggan 17).]

Notes

For cases on delay in completion, housing developers, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2856–2860.

For cases on delay in completion, sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4965–4968.

For cases on whether doctrine of frustration successfully raised, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3793–3794.

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 (folld)

Davies Contractors Ltd v Fareham UDC [1956] AC 696 (folld)

Ocean Tramp Tankers Corp v V/O Savfracht [1964] 1 All ER 161 (refd)

SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151 (refd)

Legislation referred to

Contracts Act 1950 ss 47, 56, 56(3)

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989 reg 11(1), 11(3), Schedule H

Appeal from: Civil Suit No S5-24–1213 of 2002 (High Court, Kuala Lumpur)

Tharminder Singh (Logan Sabapathy & Co) for the appellant.
Sree Harry (Sree Harry & Co) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] There are ten appeals before us today. They all give rise to common issues. In four of them there are cross-appeals. We have heard a single argument from either side in all the appeals as well as the cross appeals. The relevant facts are as follows.

[3] The appellant is a housing developer. Its activities are controlled and regulated by the Housing Development (Control and Licensing) Act 1966 ('the Act') and the Regulations made thereunder. From about 1995 to about 1997 the appellant entered into a number of agreements including those which are the subject matter of these appeals with members of the public to sell to them apartments in a condominium which the appellant had agreed to construct. Later, it transpired that the appellant was unable to make delivery of the apartments to the respondent in the ten appeals now before us. These respondents then brought actions to recover damages for delay of delivery of vacant possession of each of their apartments. In all these cases concerned, the High Court which heard the cases found for the respondents on the issue of liability. However in four of the suits the High Court refused to award the respondents compensation up to the date on which each of them had taken actual physical possession of their respective apartments. The four cross-appeals are directed against the orders in these four cases.

[4] Before us, learned counsel for the appellant raised four grounds in support of the appeals. We will deal with each of them in turn. The first point is based on s 56(3) of the Contracts Act 1950. For convenience we will set out the whole of s 56. This is what it says:

> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of failure when time is not essential

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

Effect of acceptance of performance at time other than that agreed upon

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

[5] In order to appreciate learned counsel's submissions on the application of s 56(3) it is necessary for us to deal with the relevant clauses in the statutory contract prescribed by the reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'). They are cl 22 and 24 of the sale and purchase agreement prescribed in Schedule H of the Regulations. They read as follows:

Clause 22(2)

If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the purchase price.

Clause 24

(1) The common facilities serving the said housing development shall be completed by the Vendor within thirty six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the last twenty per centum (20%) of the purchase price.

[6] It is the appellant's case that time was at large once the date for it to deliver vacant possession had passed. If any of the respondents wish to make time of the essence once more it is incumbent upon each of them to give notice in that behalf under s 56(3) of the Contracts Act 1950. In support of this argument learned counsel for the appellant referred us to a passage in the

judgment of Lee Hun Hoe CJ (Borneo) in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 where the learned Chief Justice said:

> The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion. If this is done there would be a date from which liquidated damages could be calculated. In the present appeal, at no time did the respondent give notice to the appellant. Hence cll 20 and 21 cannot be enforced.

[7] Learned counsel further submitted that his client entitled to rely on s 56(3) notwithstanding the provisions of the Act and the Regulations. In support of this argument he relied on judgment of Lord Templeman in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 where he said that the Act and the subsidiary legislation made thereunder were designed to improve and supplement common law remedies and that they do not deprive a litigant of a contractual remedy not available under the Act or the Rules made thereunder.

[8] In our opinion there is no merit in the appellant's argument. So far as s 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. This is evident in the language of cl 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. Put differently, cl 22(2) excludes the operation of s 56(3). This is another reason for holding that s 56(3) of the Contracts Act 1950 does not apply in cases falling under the Act.

[9] So far as the observation of Lord Templeman in *City Investment* is concerned, it has, in our view, been read out of context by the appellant. Here are the relevant passages in the advice which make the point clear enough:

> The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.
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> The judge also awarded damages for the difference between the construction price and the cost to the co-operative society of employing another builder to carry out the development at the date of the trial of the action. The appellants submit that the co-operative society is not entitled under the Rules to damages for the increased cost of building. But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

[10] The above quoted passages make it clear that the proposition that additional remedies are not excluded by the Act refer to the remedies available to a purchaser and not to a developer. These passages also support the view that we earlier expressed on the non-applicability of s 56(3) to a contract in Form H.

[11] That brings us to the second ground advanced in support of these appeals. It has to do with the doctrine of frustration. It is the appellant's case that the financial crisis of 1997 rendered impossible execution of the building work or the completion of the construction of the apartments in question. Since the performance of the contract became commercially impossible, the appellant should be excused from further performance of it and the contracts discharged. So goes the argument.

[12] The test for frustration which has been consistently applied by our courts is that laid down by Lord Radcliffe in *Davies Contractors Ltd v Fareham UDC* [1956] AC 696, at p 729. The principle is that a contract is frustrated when an event occurs which renders performance of the contract 'a thing radically different from that which was undertaken by the contract'. Lord Denning MR in *Ocean Tramp Tankers Corp v V/O Savfracht* [1964] 1 All ER 161 at p 166 explained Lord Radcliffe's test as follows:

> To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely

A more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v Noblee & Thorl GmbH* [1961] 2 All ER 179 at pp 185, 187, [1962] AC 93 at pp 116, 119, per Viscount Simonds and per Lord Reid.

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[13] Applying the foregoing test, we are of the view that the defence of frustration is not available to the appellant. The 1997 financial crisis merely made it more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different. There is a C further reason why the plea of frustration should fail. Under reg 11(3) of the Regulations it was open for the appellant to make representations to the Controller of Housing — to quote from the Regulation — 'owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary'. In our judgment D reg 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the Act.

[14] The third ground raised by the appellant is that the respondents are under a duty to prove the damages, if any that they have suffered. This they E have not done and their claims should therefore be disallowed. A short answer to this submission is to be found in cl 22(2) itself. The damages are liquidated and calculated in accordance with the formula prescribed by the clause. No further onus lies upon the respondents in the appeals before us.

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[15] The final point made by the appellant relates to the issue of liquidated and ascertained damages. It was submitted that by reason of s 47 of the Contracts Act 1950 the appellant need only perform its obligations within a reasonable time. Section 47 reads:

G Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

H **[16]** In our judgment this part of the case is inextricably intertwined with the s 56 argument which has already been dealt with earlier in this judgment. The answer once again lies in cl 22(2) of the statutory contract. Once the date for delivery of vacant possession passed, the appellant's liability to pay liquidated damages calculated in accordance with the formula provided I became immediate. No question of time being at large therefore arises. Accordingly, s 47 of the Contracts Act 1950 has no application to the present case.

[17] We now turn to the cross appeals. In four of the appeals before us the High Court refused to award the respondents liquidated damages for the period until they obtained actual vacant possession of their respective apartments. The factual position is this. The appellant gave each respondent concerned notice that vacant possession was available. Each notice was accompanied by a statement of the balance sum due from each respondent to the appellant. However there was at the material time liquidated damages owing from the appellant to the relevant respondents. These damages exceeded, in each case, the sum owing from the respondents to the appellant. The respondents were entitled to a set off the sums owing to them against the sums owing by them. See, *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31. Accordingly, in our judgment, the notices relied upon by the appellant were clearly invalid because delivery of vacant possession in each case was predicated upon the payment of a sum not due. The relevant respondents were therefore entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments. There is therefore merit in the cross-appeals.

[18] For the reasons already given all the appeals are dismissed. The four cross-appeals are allowed. The appellant must pay the respondents the costs of the appeals and the cross-appeals. Since only one argument was addressed in response to the appeal, we direct the taxing registrar to allow only one item of getting up to be awarded to the respondent in Civil Appeal No W-02–704 of 2002. The deposit in each appeal shall be paid out to each respective respondent. Save to the extent of the cross-appeals that have been allowed, all orders made by the High Court are affirmed.

Appeals dismissed.

Reported by K Nesan